STATE OF MICHIGAN

COURT OF APPEALS

LAKE STATES INSURANCE COMPANY,

Plaintiff,

and

DELTA PROPERTIES, INC.,

Plaintiff-Appellant

v

RIVER CITY METAL PRODUCTS,

Defendant-Appellee,

and

MIDSTATE SECURITY, d/b/a INTEC COMPANY, INC.

Defendant.

UNPUBLISHED
July 29, 2004

No. 244601
Kent Circuit Court
LC No. 96-003946-NZ

DELTA PROPERTIES, INC.,,

Plaintiff/Counterdefendant-Appellant,

v

LAKE STATES INSURANCE COMPANY,

Defendant/Counterplaintiff-Appellee.

No. 244602
Kent Circuit Court
LC No. 96-008691-NZ

Before: Fitzgerald, P.J., and Bandstra and Schuette, JJ.

PER CURIAM.

On February 21, 1996, a fire occurred at Delta Properties, Inc.'s facility in Wyoming, Michigan. The enormous facility was partitioned and rented to various industrial and storage clients. The fire began in an area leased to defendant River City Metal Products. After the fire, Lake States Insurance Company, as subrogee of Delta, filed suit against River City, alleging negligence, gross negligence, breach of contract and nuisance. Delta joined that suit as a party plaintiff. Lake States later denied coverage for the damages under its insurance policy with Delta. Delta continued to pursue the case against River City. Delta also filed a separate action against Lake States, alleging several causes of action including breach of the insurance contract and bad faith. The two cases, and numerous other cases related to the fire, were consolidated for discovery and mediation. The trial court granted partial summary disposition to River City in LC No. 96-003946-NZ, and later granted summary disposition to River City on the remaining claim in that case.[1] Delta appeals those decisions as of right in Docket No. 244601. The trial court also granted summary disposition to Lake States in LC No. 96-008691-NZ. Delta appeals that decision as of right in Docket No. 244602.[2]

I. FACTS

Delta's building contained 1,280,000 square feet of space. Numerous tenants leased and occupied various portions of the building. River City rented approximately 13,980 square feet in Unit 3 of the building. River City fabricates and paints racks for General Motors. River City's leased premises contained two paint spray booths, neither of which was equipped with a fire suppression system.

While River City's paint booths did not contain a fire suppression system, Delta's premises were equipped with an automatic sprinkling system. The system was extensive and had sixty separate risers bringing water to the system. According to Joel Langlois, Delta's president, and Bruce Langlois, Delta's chief executive officer, Delta was responsible for the maintenance and operation of the extensive sprinkling system. River City's lease expressly contained a provision making Delta responsible for the system. Nothing in its leases permitted the tenants to maintain or repair the system. Delta retained control over and had the ability to fix and maintain the sprinkling system in February 1996, at the time of the fire. Delta's in-house maintenance men primarily serviced and conducted periodic checks on the sprinkling system.

On February 2, 1996, River City employee Teddy Ray Cass hit a portion of the sprinkling system with a rack that he was carrying on a hi-lo forklift.[3] Cass shut off the water to the sprinkling system near the point where the system was damaged. This act lessened the mess

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[1] The later dismissed claim against River City related to Delta's claim of lost personal property and is not an issue in these consolidated appeals.

[2] Delta's initial claim of appeal was dismissed by this Court for lack of jurisdiction.

[3] Contrary to his previous statements, Cass testified at deposition that he did not actually cause the damage on February 2, 1996. He claimed that a painter named "Jeff" hit the system with the rack. After Jeff told Cass what he had done, Cass shut off the water.

being caused by releasing water. Each water riser to Delta's system was capable of being separately disabled.

At approximately 5:00 a.m. on February 2, 1996, Walt Steil, Delta's on-call maintenance employee, was paged and informed that there was a problem with the system and that the problem was located at Riser 48. Steil immediately went to River City's premises. He met with Cass, learned about the accident, and learned that Cass had shut off the water. Steil shut down the rest of the system at Riser 48 by turning off the air to the system and opening a drain to release water that had accumulated. When Steil shut down the system, which was located in a "dog house" like structure, he warned Cass about an extension cord that was plugged into an outlet in the dog house. No cords were supposed to be plugged into that outlet. Cass observed that there was an extension cord improperly plugged into the outlet that morning.

When Steil responded to the Riser 48 incident on February 2, 1996, he was upset. River City employees had previously broken Riser 48's drum drip several times by hitting it with objects on the hi-lo forklift. Steil usually made the necessary repairs to the system, but on this occasion of February 2, 1996, he allegedly told Cass that River City should take care of the damage itself. He instructed Cass to talk to his supervisor about the problem. According to Steil, Cass indicated that he would talk to his supervisor. Thus, Steil believed that River City would take care of the problem. He admitted, however, that he possibly could have fixed the problem right away. In fact, it was undisputed that the problem was easy to fix and could have been quickly fixed if the necessary parts were available. Steil never repaired the system or followed up to determine if the system was repaired. He never spoke to Cass between February 2, 1996 and February 21, 1996. In addition, neither Steil nor any other Delta personnel notified Lake States that the system was inoperable. William Hentig, Delta's maintenance director, indicated that Delta should have gotten the system working after the fire. He would never have wanted River City to undertake repairs to the sprinkling system on its own.

Cass indicated that he talked with his supervisor about the sprinkling system after it was shut down. Two or three days before the fire, Cass again talked to his supervisor about the broken pipe. Cass indicated that Steil was grumpy when called about the problem in the early morning. Cass told his supervisor that Steil planned to come back to fix the sprinkler. Cass said nothing about River City being responsible for repairing the system.

On February 21, 1996, at approximately 8:30 p.m., a fire started in the area leased by River City. It began directly next to Riser 48. Riser 48 was still inoperable at the time of the fire. While water poured from all of the other Riser systems, none emitted from Riser 48's system. According to Joel Langlois, the fire moved up to the wooden ceiling and spread from there, above the sprinklers. The fire was contained at approximately 4:00 a.m. It was estimated that 103,500 square feet of space was destroyed and an additional 122,000 square feet was damaged. The cause of the fire was determined to be a frayed extension cord. Joel Langlois testified that he learned only after the fire that Steil responded to a problem with the sprinkler system in early February, did not fix the problem, and left the system turned off after that time. Similarly, Bruce Langlois testified that he first learned that Riser 48 was shut down after the fire.

Lake States ultimately denied insurance coverage to Delta because of language in the policy, specifically a Protective Safeguard Endorsement (PSE), which required Delta to maintain the system in complete working order or notify Lake States if it was not in working order.

In LC No. 96-003946-NZ, Lake States, as subrogee of Delta Properties, filed suit against River City for negligence, gross negligence, breach of contract and nuisance.[4] Delta later moved to substitute as the plaintiff, and was allowed to do so. After Lake States denied coverage, Delta continued to pursue the case against River City. The case was ultimately resolved by way of summary disposition in favor of River City.

In LC No. 96-008691-NZ, Delta filed a complaint against Lake States, alleging numerous claims related to Lake States' failure to cover Delta's loss under the insurance policy. Lake States filed a countercomplaint against Delta for breach of contract to recover money it had paid to Delta's mortgage holder before denying coverage. The trial court granted summary disposition to Lake States on both the complaint and countercomplaint in LC No. 96-008691-NZ

II. Standard of Review

The grant of a motion for summary disposition is reviewed de novo. *Ormsby v Capital Welding, Inc*, 255 Mich App 165, 172; 660 NW2d 730 (2003). Although the trial court did not indicate under what subsection of MCR 2.116(C) it was granting summary disposition, it is undisputed that River City moved for summary disposition under MCR 2.116(C)(10) and that, in granting summary disposition, the trial court considered evidence outside of the pleadings. Thus, review is appropriate under the standard for MCR 2.116(C)(10). *Steward v Panek*, 251 Mich App 546, 555; 652 NW2d 232 (2002).

> A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. When reviewing a trial court's decision to grant a motion for summary disposition, we consider the pleadings, affidavits, depositions, admissions, and other documentary evidence in a light most favorable to the nonmoving party. The court should grant the motion only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. [*Id.* (citations omitted).]

III. Analysis

A. Immunity: Tenant's Reliance on Landlord to Obtain Fire Insurance

Delta first argues that River City's lease obligated it to obtain public liability, property damage, and plate glass insurance and to name Delta as an additional insured on these policies. Delta asserts that the lease did not require Delta to provide fire insurance coverage at all. Further, River City was required to surrender the premises at the termination of the lease in as good condition as the premises were received. This "yield up" provision did not contain any exception for fire damage. And, the lease contained an indemnification clause, which provided that the lessor would not be liable for any damage or injury to the lessee or any other person or

[4] Lake States also initially sued Midstate Security, the alarm company that monitored the sprinkler system for Delta's property.

property. Thus, Delta argues that River City was ultimately responsible for damages to the premises.

In this case, there was no express agreement that River City, the tenant, would be liable to Delta, the landlord, for fire damage to the property caused by River City's negligence. The lease agreement clearly evidenced a mutual expectation that fire insurance would be obtained by Delta. River City was specifically instructed with respect to the type of insurance it was required to have. It was not required to maintain fire insurance on the building, realty or fixtures. Paragraph 25 of the lease agreement indicated that Delta was responsible for repairs to the building *from any cause.* Both Bruce and Joel Langlois specifically testified that River City did not have to insure the building. The evidence presented to the trial court leads to only one conclusion. River City, the tenant, could reasonably expect that Delta, the landlord, would secure fire insurance and pay the premiums from the rents. There was no express agreement that River City would be separately responsible for the building.

Delta's argument that River City did not rely on Delta to procure fire insurance must also fail. Delta claims that River City purchased its own fire insurance and thus, cannot argue that it relied on Delta to purchase fire insurance. As previously noted, River City was required to insure its business property, insure plate glass, and insure against bodily injury. River City obtained a fire policy to cover its business property interest, not Delta's premises. Delta is attempting to muddy the water before this Court by suggesting that River City somehow undertook to insure the building or leased premises against fire damage. Nothing in the record supports this argument.

In addition, contrary to Delta's argument, the indemnification provision in paragraph 18 of the lease does not contemplate that the parties expected River City to be ultimately responsible for damages *to* the premises. The provision merely absolves the lessor of liability and damage or injury to the lessee or any other person or property *occurring on or around the leased premises* or the building. The lessee agreed to hold the lessor harmless for claims of those damages. The indemnification provision does not address damage *to* the lessor's building and does not require the lessee to, in any way, indemnify the lessor for damages *to* the premises itself. Moreover, paragraph 25 of the lease unequivocally states that the lessor was expressly maintaining responsibility for repair of damages to the premises *from any cause.* It is misleading for Delta to suggest to this Court that there was an indemnification provision that required River City to indemnify Delta for fire-related damage to the building.

In addition, we reject Delta's argument that, because River City was required by its lease to return the property "in as good condition as received," it must be liable for the fire damage. Delta cites no authority to support this cursory argument. An appellant may not merely announce a position and leave it to this Court to discover and rationalize the basis for its claims, nor may it give cursory treatment with little or no citation of supporting authority. *Houghton v Keller,* 256 Mich App 336, 339-340; 662 NW2d 854 (2003).

The evidence supports a finding that, if the sprinkling system had been fixed, damages to Delta's building would have been inconsequential. Further, if the sprinkling system had been fixed, or Delta had informed its insurer that the system was not operable, as required by the policy, there would have been insurance coverage. The trial court opined, and we agree that:

> [T]o allow Delta to now recover from River City would absolve Delta from serious breaches of its insurance contract and from ignoring its obligation to its tenants to insure the premises out of their rents. There is "a long line of venerable precedent" which says that a party to a contract may never be permitted to recover damages for its own non-performance. *Kiff Contractors, Inc v Beeman,* 10 Mich App 207, 210; 159 NW2d 144] (1968). See also *West American Ins Co v Pic Way Shoes*, 110 Mich App 684, 686; 313 NW2d 187 (1981).

Delta adamantly attempts to persuade this Court to accept that River City is entirely responsible because it damaged the sprinkler, shut down the system, and started the fire. It contends that it should be allowed to proceed against River City on its claims of negligence because of River City's conduct. Delta completely ignores that it had responsibilities under both the lease agreement, requiring it to maintain the sprinkler system and prohibiting River City from repairing it, and its insurance policy, requiring repair of the system or notification to the insurance company. If Delta had met its contractual responsibilities under the lease and its insurance contract, the damage would have been minimal and there would have been insurance for the damages. Delta's breach of its obligations resulted in Delta's predicament. It may not recover damages that were caused by its own breaches. See *Kiff*, *supra,* citing *Barton v Gray*, 57 Mich 622; 24 NW 638 (1885) (one who causes or sanctions a breach of an agreement may not recover damages for its nonperformance).

B. Immunity From Liability for Damages Other Than To Leased Premises

Delta next argues that the trial court was incorrect when it refused to hold River City liable for damages that occurred to the building and premises outside of the confines of the space leased to River City. It argues that, at the very least, River City should pay Delta for damage to areas of the building leased by other tenants. In making its argument, Delta fails to cite any authority to support its position. Additionally, its argument is cursory and fails to adequately explain or rationalize its position. An appellant's failure to properly address the merits of an asserted error constitutes abandonment of the issue. *Houghton, supra* at 339-340. "An appellant may not leave it to this Court to discover and rationalize the basis for its claims and may not give an issue cursory treatment with little or no citation to authority." *Id.* at 339.

C. Forfeiture from Coverage for Fire Loss

Delta next argues that the trial court erred when it ruled that the insured forfeited its coverage for fire loss under the policy. The PSE provided that, as a condition of the insurance, Delta had to maintain the automatic sprinkler system. The PSE further provided:

> We will not pay for loss or damage caused by or resulting from fire if, prior to the fire, you,
>
> a. Knew of any suspension or impairment in any protective safeguard listed in the schedule above and failed to notify us of that fact; or
>
> b. Failed to maintain any protective safeguard listed in the Schedule above, and over which you had control, in complete working order.

> If part of an Automatic Sprinkler System is shut off due to breakage, leakage, freezing conditions or opening of sprinkler heads, notification to us will not be necessary if you can restore full protection within 48 hours. [Insurance policy, PSE, p 2 of 2.]

The interpretation of a contract presents a question of law, which is reviewed de novo. *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 425; 670 NW2d 651 (2003). The same standard applies with respect to whether an ambiguity in the policy language exists. *Wilke v ACIA*, 469 Mich 41, 47; 664 NW2d 776 (2003). "The primary goal in the construction or interpretation of any contract is to honor the intent of the parties." *J & J Farmer Leasing, Inc v Citizens Ins Co*, ___ Mich App ___; ___ NW2d ___ (2004) (Docket No. 239069, issued February 12, 2004), slip op at 2, lv pending. An insurance contract should be read as a whole and all terms should be given meaning. *Steinmann v Dillon*, 258 Mich App 149, 154; 670 NW2d 249 (2003). If the insurance contract is found to be ambiguous, it should be construed against the drafter and in favor of the insured. *Id.* See also *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 567; 489 NW2d 431 (1992) (exclusionary clauses are strictly construed in favor of the insured). An insurance contract is ambiguous if, after reading the entire contract, its language can reasonably understood in different ways. *Steinmann*, *supra* at 154. If a contract is inartfully worded or clumsily arranged, it is not considered ambiguous if it fairly admits of but one interpretation. *J & J Farmer*, *supra*, slip op at 2. In fact, as a general principle, an insurance contract is clear if it fairly admits of but one interpretation. *Steinmann*, *supra* at 154. When the language of a contract is unambiguous, courts should construe and enforce the contract as written. *J & J Farmer*, *supra*, slip op at 2. Additionally, it is axiomatic that an insurer may limit the scope of coverage or define the scope of coverage as long as the policy language fairly leads to only one reasonable interpretation and is not in contravention of public policy. *Nikkel*, *supra* at 568. "[C]overage under a policy is lost if any exclusion within the policy applies to an insured's particular claims." *Churchman*, *supra* at 567. Clear and specific exclusions must be given effect because an insurance company should not be liable for risks it did not assume. *Id.* On the other hand, a policy that is ambiguous should not be construed to defeat coverage. *Vanguard Ins v Racine*, 224 Mich App 229, 231; 568 NW2d 156 (1997).

The initial question is whether the language of the exclusion is ambiguous. Reading the PSE as a whole, it is not ambiguous. It fairly leads to only one reasonable interpretation. Thus, the trial court properly enforced it as written and found that coverage was forfeited. The PSE provided that Delta must maintain the sprinkling system and that there would be no coverage if Delta knew of any suspension or impairment and failed to notify Lake States or if it failed to maintain the sprinkling system in complete working order. An exception to the notification requirement indicated that notification was not necessary under certain circumstances if Delta could restore full protection within forty-eight hours.

Delta attempts to argue ambiguity in the language of the exclusion. It claims that the language could be construed to mean that Delta did not have to notify Lake States if it *could* have restored full protection within forty-eight hours. In other words, the PSE did not require Delta to restore full function within forty-eight hours, but required notification only if it did not have the capability of restoring function within forty-eight hours. Thus, while the system was shut down for nineteen days before the fire, notification was not necessary because Delta could have fixed it within forty-eight hours if it had chosen to do so. As the trial court determined, this

argument is an unreasonable interpretation of the language and ignores specific language in the PSE. The PSE required Delta to maintain the automatic sprinkling system. The term "maintain" was not defined in the policy and thus, must be afforded its commonly used meaning. *Morinelli v Provident Ins Co*, 242 Mich App 255, 262; 617 NW2d 777 (2000).[5] The word "maintain" means "to keep in existence or continuance, preserve, to keep in due condition, operation or force." *Random House Webster's College Dictionary* (2d ed). Thus, the PSE required Delta to keep the sprinkling system in operation. It voided coverage under the two circumstances previously described and allowed for relief from the notification required in only one narrow circumstance, i.e., if the system could be repaired within forty-eight hours. Read as a whole, there can be no question that the purpose of the PSE was to make sure that the system was operational and that, if it was not, Lake States would be notified. It would be ridiculous to accept that Delta could indefinitely refrain from notifying Lake States because it *could* have, but chose not to, repair the system within forty-eight hours. Such an interpretation would completely ignore that the PSE required Delta to maintain the system. The language has only one fair interpretation and should be enforced as written.

In arguing its position, Delta contends that the trial court improperly made findings of fact. This argument has no merit. The trial court's "findings" were based on undisputed evidence. It was undisputed that Steil knew that the system was shut off on February 2, 1996. He finished the shut-down at Riser 48. It was also undisputed that employees of Delta attempted to contact Hentig, who was in charge of maintenance for the building, on numerous occasions. They left approximately thirty messages, asking to be contacted. No one from Delta responded. Moreover, it is undisputed that no repairs were made before the fire. The repairs were very simple and could have been completed within hours. River City, by the terms of its lease, was prohibited from repairing the sprinkling system itself. Delta was expressly responsible for the system under both the lease and its insurance policy with Lake States. Moreover, it is undisputed that Lake States was never notified that the downed portion of the system remained nonoperational. Regardless of Delta's strained attempt to argue that there were disputed facts, there simply were no questions of material fact with respect to the above assertions.

Delta also attempts to create a question of fact about whether it knew the system was inoperable such that it had an obligation to repair or notify Lake States. There is no question of material fact on this issue. Steil was aware that the system was shut down in the area of Riser 48. He was the on-call maintenance person for Delta, had responded to similar calls in the past, and usually made repairs to the sprinkling system in Delta's facility. In his recorded statement after the fire, Steil indicated that he could not remember if he reported the incident to Delta's management. In a later statement he said that, when he reported for his regular shift on the morning of February 2, 1996, he was sure he said something at the maintenance crew meeting about the call he had received earlier that morning. He was unsure about what was said. Steil later testified at deposition that he could not recall telling other Delta personnel about the call. There was no question, however, that he knew the system needed repair, and that, under both the

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[5] The fact that the policy did not define the term "maintain" does not render it ambiguous. *Morinelli, supra*.

insurance policy and its lease with River City, Delta was obligated to maintain the system. It matters not that Steil claims to have instructed Cass, a low level employee, to tell his supervisor to fix the sprinkler. River City was prohibited by its lease from repairing the sprinkler. Delta was in charge and control of the system and had an express contractual obligation to the fix the system. Steil specifically knew the system was down and needed repair.

As a matter of law, Steil's knowledge that the system was shut down was knowledge of the corporation. In *Gordon Sel-Way, Inc v Spence Bros, Inc*, 177 Mich App 116, 124; 440 NW2d 907 (1989), rev'd in part on other grounds 438 Mich 488 (1991), the Court stated:

> "When a person representing a corporation is doing a thing which is in connection with and pertinent to that part of the corporation which he is employed, or authorized or selected to do, then that which is learned or done by that corporation. The knowledge possessed by a corporation about a particular thing is the sum total of all the knowledge which its officers and agents, who are authorized and charged with the doing of the particular thing acquire, while acting under and within the scope of their authority." [Quotation omitted.]

See also *Upjohn, supra,* at 214. As previously noted, Steil knew the system was impaired and never followed up to insure that it was repaired and made operational. He usually performed sprinkler repairs, had performed the same or similar repairs on other occasions, and was on call as Delta's agent to make repairs. Moreover, a reasonable inference can be drawn that Delta employees, specifically Hentig, should have been alerted to a problem because of the frequency and number of calls placed by River City to Delta in the weeks before the fire. Delta took no responsibility to determine the impetus for the calls. Delta had knowledge that the sprinkler system was impaired. Under the policy, if Delta knew the system was impaired, it had an obligation to notify Lake States. There were no questions of fact that would impair the trial court's resolution on the matter of coverage.

D. Waiver and Estoppel of Forfeiture Claim

Delta next argues that the trial court erred when it ruled, as a matter of law, that the insurer did not waive the forfeiture and was not estopped from asserting forfeiture. The trial court correctly granted summary disposition to Lake States, finding that it had not waived the PSE and was not estopped from relying on the PSE to deny coverage.

In October 1994, an insurance investigation report was prepared with respect to numerous properties owned by Delta. The report noted that Delta had a poor safety attitude and was neither truthful nor honest during the interview, specifically with respect to the sprinkler system. The inspectors did not believe that Delta would follow through with any of the recommendations that would be made. They concluded that Delta was a poor risk and that the sprinkler systems in various buildings owned by Delta should be discounted. The report recommended several priority actions that should be completed within thirty days of the report, including that Delta should obtain a service contract with a qualified sprinkler contractor to inspect the systems on an annual basis. In response to the inspection report, on December 20, 1994, Joel Langlois sent letters to Delta's tenants and outlined areas that needed to be addressed per the insurance inspection. Joel Langlois also sent a latter to David Drake of Universal Insurance Services, the underwriter, indicating that Delta's sprinkler systems "are now inspected

and tested on a more than annual basis and that all of the systems were monitored by Midstate Security in Grand Rapids." Drake subsequently sent a letter to one of the insurance investigators, enclosing copies of Delta's tenant letter and indicating that Delta appeared very interested in maintaining safety standards and addressing the sprinkling systems issues in the various buildings.

In March 1995, when Delta's policies were due for renewal, Drake was asked to follow up on Joel Langlois' representations about the sprinkler system. Cliff Schneider, vice president of commercial underwriting for Lake States, averred that he was familiar with Delta's policy. He averred that Lake States was led to believe that the sprinkler system in question was upgraded from the condition that existed in October 1994 and that Delta was maintaining the system. "Based upon the representations made by Delta, Lake States Insurance Company issued a policy of insurance that included a Protective Safeguard Endorsement." Schneider further averred that the premium for the policy was based on the existence of a working sprinkler system and was charged based on the inclusion of the PSE. He more specifically averred that, when the policy was renewed in March 1995, Delta led Lake States to believe that the complete sprinkler system, including Riser 48, was operational. Nothing in the record refutes these statements or the evidence offered with respect to the renewal of the policy. Delta concedes that, of the sixty risers servicing the facility at issue, only one, Riser 48, was not operable at the time of the fire. The reason for its nonoperation was fully developed in the lower court record. There is no question that the system was in complete working order at times after the policy was renewed.

Delta nevertheless argues that the doctrines of waiver or estoppel should bar Lake States from denying coverage based on the PSE. In *Kirschner v Process Design Associates, Inc,* 459 Mich 587, 593-594; 592 NW2d 707 (1999), the Court stated the general rules with respect to waiver and estoppel in the insurance policy context:

> The application of waiver and estoppel is limited, and, usually, the doctrines will not be applied to broaden the coverage of a policy to protect the insured against risks that were not included in the policy or that were expressly excluded from the policy. *Ruddock v Detroit Life Ins Co*, 209 Mich 638, 654; 177 NW 242 (1920); *Lee v Evergreen Regency Cooperative*, 151 Mich App 281, 285; 390 NW2d 183 (1986). This is because an insurance company should not be required to pay for a loss for which it has charged no premium. *Id.* As this Court has explained, applying the doctrine of waiver and estoppel to broaden the coverage of a policy would make a contract of insurance
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> "cover a loss it never covered by its terms, to create a liability not created by the contract and never assumed by the defendant under the terms of the policy. In other words, by invoking the doctrine of estoppel and waiver it is sought to bring into existence a contract not made by the parties, to create a liability contrary to the express provisions of the contract the parties did make."
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> Despite the limited applications of waiver and estoppel, in some instances, courts have applied the doctrines to bring within coverage risks not covered by the policy. For example, in situations in which the insurance company has misrepresented the terms of the policy to the insured or defended the insured without reserving the right to deny coverage, courts have extended coverage

> beyond the terms of the policy when the inequity to the insurer as a result of the broadened coverage is outweighed by the inequity suffered by the insured. [Citations omitted.]

In *South Macomb Disposal, supra,* this Court acknowledged the general rule that waiver and estoppel may not be used to broaden policy coverage to protect an insured against risks not included in the policy or expressly excluded from the policy. "This restriction is based on the rule that the insurer should not be required, through waiver and estoppel, to cover a loss for which no premium was charged." *Id.* This Court noted that there are exceptions in two broad classes:

> The first class involves companies which have rejected claims of coverage and declined to defend their insured in the underlying litigation. In these instances, the Court has held that the insurance company cannot later raise issues that were or should have been raised in the underlying action. These cases are closely akin to the principle of collateral estoppel. . . .
>
> The second class of cases . . . involves instances where the inequity of forcing the insurer to pay on a risk for which it never collected premiums is outweighed by the inequity suffered by the insured because of the insurance company's actions. The insurance company has either misrepresented the terms of the policy to the insured or defended the insured without reserving the right to deny coverage. [*Id.*, citing *Lee, supra,* at 286-287.]

Delta attempts to fit the facts of this case within the second class of cases. Delta wants this Court to accept that the inequity to it outweighs any inequity to Lake States because Lake States knew, in 1994, that Delta did not have a good, operative sprinkler system. This argument is disingenuous. As previously discussed, the evidence demonstrated that, before the policy was renewed by Lake States in 1995, Lake States believed that Delta had made improvements and was willing to maintain the system as operational. It was undisputed that, before the fire, the sprinkler system was brought up to a fully operational standard, unlike its condition in October 1994. Moreover, Delta agreed to the language in the policy, including the PSE, which was unambiguous. The PSE required Delta to maintain the system. The record does not support that Lake States misrepresented the coverage or exclusions of the policy. And, the evidence established that the charged premium was based on both an assumption that the building had an operational sprinkler system and that the PSE was included in the policy.[6] Delta did not produce

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[6] In its reply brief on appeal, Delta argues that Schneider's statements in paragraphs 10-14 of his affidavit are not based on personal knowledge, that Schneider was not legally competent to make the statements, and that the statements are hearsay. Delta does not explain its accusations with respect to this affidavit. Nothing in the record reveals that Schneider did not have first hand knowledge with respect to his statements. Schneider was Lake States' vice president of commercial underwriting when the policy was renewed in March 1995, and he averred that he was familiar with the insurance policy and the 1994 inspection report. Moreover, in paragraph 11, he averred that the "premium for the insurance policy at issue was based upon a working sprinkler system, and the premium was charged based upon the Protective Service Endorsement

(continued…)

any evidence to refute Schneider's statements or to support its position that the inequity to it resulting from forfeiture of coverage outweighed any inequity to Lake States if it was required to pay on the policy. Delta had no reasonable expectation that there would be coverage if it did not maintain the system or notify Lake States when it was nonoperational.

Contrary to Delta's argument, *Gordon, supra*, and similar cases, do not require reversal of the grant of summary disposition in favor of Lake States. In *Gordon*, the insurance policy was issued by the defendant at a time when the insured building was vacant. *Id.* at 231. The terms of the policy provided that the policy was void if the building was or became unoccupied or vacant and remained that way for ten days. *Id.* The building was vacant for several months before the fire. *Id.* at 228-229. The Court held that an insurance company is estopped from asserting policy forfeiture based on conditions that existed at the time of the fire if the conditions existed, to the knowledge of the insurance company, at the making of the contract. *Id.* at 234-235.

> The loss occurred when the premises were in the same condition, to the knowledge of the company, as when the contract of insurance was entered into; there was no agreement in the policy that the condition of the premises should be changed; under the authorities cited the defendant is liable, and the defense here invoked is not available to it. [*Id.* at 241.]

In this case, Delta urges that the condition of the property, it being "unsprinklered," was present at the time the policy was issued in March 1995 and at the time of the fire. This contention is inaccurate based on the facts. Before Lake States agreed to reissue the policy in March 1995, there were discussions with Delta about the sprinkler system. Delta indicated a willingness to improve the sprinkler system and accepted the policy with the PSE, which required Delta to maintain the system in *complete* working order and to notify Lake States if it could not do so. The system was brought up to complete working order before the fire. The evidence leaves no doubt or controversy that the building was not "unsprinklered" at the time of the fire, even if it was considered as such in the fall of 1994. As a matter of law, the doctrines of

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(…continued)

being included in the insurance policy." The record does not support that this is a hearsay representation. Delta's bold, unsupported, allegation that Schneider could not testify at trial to the contents of his affidavit should be rejected. Affidavits, deposition testimony, party admissions or other documentary evidence must support a motion for summary disposition. *SSC Associates Ltd Partnership v General Retirement System of the City of Detroit*, 192 Mich App 360, 363-364; 480 NW2d 275 (1991), citing MCR 2.116(G)(3). "Opinions, conclusory denials, unsworn averments, and inadmissible hearsay do not satisfy the court rule; disputed fact (or the lack of it) must be established by admissible evidence." *Id.* at 364. Affidavits filed in favor or against summary disposition do not resolve issues of fact, but rather, they assist the court in determining whether an issue of fact exists. *Id.* They must be made on the basis of personal knowledge and must set forth facts that would be admissible as evidence to establish or deny the grounds stated in the motion. *Marlo Beauty Supply, Inc v Farmers Ins Group*, 227 Mich App 309, 321; 575 NW2d 324 (1998), lv den 459 Mich 954 (1999). Schneider signed his sworn affidavit and averred that it was based on his knowledge as the vice president of underwriting. He was familiar with the policy. He further averred that, if called to testify, he would testify in accordance with his affidavit. Delta produced no evidence to refute Schneider's statements. There was no question of material fact with respect to his representations.

waiver and estoppel do not preclude Lake States from relying on the PSE to void coverage under the policy.

E. Inconsistent Remedy

Finally, Delta argues that the remedy imposed by the trial court was inconsistent with the parties' agreement and therefore legally erroneous. However, Delta's argument is cursory and unsupported by any citation to authority. Moreover, Delta completely fails to explain or rationalize its position or theory with respect to the mortgage, which was paid by Lake States before it denied coverage. The trial court ordered Delta to repay Lake States. An appellant's failure to properly address the merits of an asserted error constitutes abandonment of the issue. *Houghton, supra* at 339-340. "An appellant may not leave it to this Court to discover and rationalize the basis for its claims and may not give an issue cursory treatment with little or no citation to authority." *Id.* at 339.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra
/s/ Bill Schuette